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By ECFS

August 16, 2010

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Implementation of Section 224 of the Act*, WC Docket No. 07-245,
A National Broadband Plan for Our Future, GN Docket No. 09-51

Dear Secretary Dortch:

The Massachusetts Department of Telecommunications and Cable ("MDTC")¹ respectfully submits this letter as comments pursuant to the Order and Further Notice of Proposed Rulemaking ("*Order and FNPRM*"), released on May 20, 2010, by the Federal Communications Commission ("FCC"), in the above-captioned proceeding.² In the *Order and FNPRM*, the FCC clarifies existing statutory pole attachment obligations and invites comment on several pole attachment proposals.³

In the *Order*, the FCC clarifies that the statutory obligation to provide nondiscriminatory access to attachers requires pole owners to permit attachers to use any attachment technique that

¹ The MDTC is the exclusive state regulator of telecommunications and cable services within the Commonwealth of Massachusetts. G. L. c. 25C, § 1.

² *In the Matter of Implementation of Section 224 of the Act*, WC Docket No. 07-245, *A National Broadband Plan for Our Future*, GN Docket No. 09-51, FCC 10-84 (rel. May 20, 2010) ("*Order and FNPRM*").

³ *Id.* at ¶ 1.

the pole owner itself uses in similar circumstances.⁴ The FCC also clarifies that the duty to provide pole access in a timely manner applies to the entire pole attachment process, including make-ready, and any delays “not warranted by the circumstances ... are unjust and unreasonable under section 224.”⁵ The MDTC agrees with both of these clarifications.

With regard to the FCC’s proposals, the MDTC restricts its comments to four specific provisions, which would: (1) set a comprehensive timeline for the pole attachment process;⁶ (2) permit attachers to use qualified independent contractors for surveys and make-ready work if the pole owners have failed to perform the work within the established timeframe, as well as setting rules for contractor approval;⁷ (3) require the designation of a “managing owner” for all poles that are jointly owned in order to simplify the attachment process; and (4) establish a more uniform rate for attachers.⁸ The MDTC also proposes that the FCC establish interim measures to facilitate timely attachments for infrastructure projects funded by the American Recovery and Reinvestment Act (“ARRA”)⁹ and the Broadband Technology Opportunities Program (“BTOP”).^{10,11}

As an initial matter, since Massachusetts has certified that it regulates pole attachments and satisfied certain conditions,¹² the MDTC notes that the proposed rules would not apply in Massachusetts.¹³ Indeed, the MDTC believes that states are often in the best position to establish

⁴ *Id.* at ¶¶ 8-16. *See also* 47 U.S.C. § 224(f)(1) (stating a utility must provide any cable or telecommunications company nondiscriminatory access to any pole, conduit or right-of-way it owns or controls).

⁵ *Order and FNPRM*, at ¶ 17. *See also* 47 U.S.C. §224(b)(1) (requiring all pole attachment rates, terms, and conditions to be “just and reasonable”).

⁶ *Order and FNPRM*, at ¶¶ 31-45.

⁷ *Id.* at ¶¶ 58-60.

⁸ *Id.* at ¶ 72.

⁹ American Recovery and Reinvestment Act of 2009 (“ARRA”), Pub. L. No. 111-5, 123 Stat. 115 (2009).

¹⁰ The Broadband Technology Opportunities Program, which is administered by the National Telecommunications and Information Administration (“NTIA”), was provided with \$4.7 billion by the ARRA to use in support of the deployment of broadband infrastructure, to enhance and expand public computer centers, to encourage sustainable adoption of broadband service, and to develop and maintain a nationwide public map of broadband service capability and availability. *See Broadband USA: Connecting America’s Communities*, <http://www2.ntia.doc.gov/about> (last viewed Aug. 13, 2010).

¹¹ *See Omnibus Broadband Initiative*, Federal Communications Commission, Connecting America: The National Broadband Plan, at 129 (2010) (“National Broadband Plan”), *available at* <http://download.broadband.gov/plan/national-broadband-plan.pdf> (last viewed Aug. 13, 2010).

¹² 47 U.S.C. § 224(c) (providing for state authority over pole attachments upon certification by the state that it regulates pole attachment rates, terms, and conditions and has made effective rules and regulations implementing such regulatory authority).

¹³ *See States That Have Certified that They Regulate Pole Attachments*, WC Docket No. 10-101, *Public Notice*, DA 10-893 (rel. May 19, 2010) (listing Massachusetts as one of the states that has certified that it regulates pole attachments). *See also* 47 U.S.C. § 224 (c)(1) (stating that the FCC does not have jurisdiction over pole attachments in states that certify that they regulate pole attachments).

pole attachment rules that are flexible and designed to reflect local conditions. However, the adoption of new federal pole attachment rules will provide guidance to states in developing or amending their own regulations and will benefit all states to the extent that national providers integrate these rules into their pole attachment process on a nationwide basis. Accordingly, we make the following recommendations with regard to the proposed federal rules.

First, the MDTC agrees with the five-stage comprehensive timeline proposed by the FCC, since “timely action by all the relevant participants in the pole attachment process is important to ensure just and reasonable access to poles.”¹⁴ The MDTC also agrees that a timeline for every phase of the pole attachment process, rather than just the application response period, would significantly reduce the average length of the process and would provide attachers with greater certainty without imposing an unnecessarily heavy burden on pole owners.¹⁵

Second, the MDTC supports the FCC’s proposed rule allowing attachers to use qualified independent contractors when the pole owner’s employees are unable to complete the necessary surveys and make-ready work within the specified time limit.¹⁶ We further support requiring pole owners to make publicly available a list of pre-approved, qualified independent contractors as well as specifying the criteria used for approval and qualification. The MDTC believes that these provisions will result in a more efficient pole attachment process, and will facilitate compliance with the proposed timeline. The MDTC notes, however, that collective-bargaining agreements, entered into by utilities, often preclude the use of outside contractors on their facilities, which may significantly impede attachers’ abilities to exercise their rights under these provisions.¹⁷

Third, the MDTC recognizes that coordinating with joint pole owners can significantly increase the logistical burden on potential pole attachers.¹⁸ Consequently, we support a

¹⁴ *Order and FNPRM*, at ¶¶ 25, 31-44. The MDTC reiterates that these comments support the proposed federal rules, and, thus, if the MDTC were to open a proceeding to update the pole attachment regulations in Massachusetts, such regulations would only be based on the record in that proceeding.

¹⁵ *See id.* at ¶¶ 29-30.

¹⁶ *Id.* at ¶¶ 58-60 (additionally proposing to retain the current rules regarding the actual attachment work, which permit attachers to use their own qualified contractors).

¹⁷ *See, e.g.,* Mass. Dep’t of Telecomms. and Energy Evaluation – Volume I of II, Public Version, *Application New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), and Verizon Global Networks Ind., For Authorization Under Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Massachusetts*, CC Docket No. 00-176, at 264 (filed Oct. 16, 2000) (noting that Verizon-Massachusetts had stated that its collective-bargaining agreements “permit only [Verizon] employees to perform work on its own facilities” and that the use of outside contractors was only permitted if “(1) emergency conditions exist; (2) [Verizon] does not own the equipment necessary to do the work; or (3) during limited periods of unusual load conditions, [Verizon’s] ability to meet its service commitments is in jeopardy, and the existing workforce cannot meet these needs even after the use of overtime and available temporary transfers”).

¹⁸ *See Order and FNPRM*, at ¶ 72.

requirement that joint pole owners designate a managing owner that will be responsible for all attachment requests. However, such a requirement is of little use if pole attachers are unable to easily identify the managing pole owner for any particular pole.¹⁹ Recognizing this, the MDTC also supports the proposed requirement that all pole owners make publicly available a list of managing pole owners for every pole.²⁰ The MDTC notes that the current practice in Massachusetts is to designate a managing utility for jointly owned poles, and additionally recognizes that pole owners have generally been good at identifying the managing utility to attachers.

Fourth, the MDTC supports the FCC's proposed establishment of a more uniform rate system for pole attachments.²¹ Currently, cable companies that provide telephone services pay a different and lower attachment rate than companies that provide traditional wireline telephone services, simply by virtue of the companies' designation as cable providers or local exchange carriers ("LECs").²² This regulatory inequity may not have been problematic when cable and telephone companies provided discrete services and competed in different markets, and served worthy goals in promoting the cable buildout.²³ But now that the advent of new technologies has placed many cable companies in direct competition with LECs through the services offered, this regulatory anachronism is no longer justified by its original purposes nor most likely by any cost basis.²⁴ Such services are indistinguishable to end users, but competitive LECs often pay a higher rate, unlikely justified based on cost,²⁵ for pole attachments than their cable competitors.²⁶ A more unified attachment rate would foster equitable competition for all telephony service providers; create regulatory certainty for telephone, cable and broadband companies; and ultimately benefit consumers.²⁷

Finally, as emphasized by the National Broadband Plan, timely pole attachment is particularly important for development projects funded by the ARRA and the BTOP.²⁸ The

¹⁹ *See id.*

²⁰ *See id.*

²¹ *See id.* at ¶ 20.

²² *See MDTC Comments, Petition for Declaratory Ruling of American Electric Power Service Corporation et al. Regarding the Rate for Cable System Pole Attachments used to provide Voice over Internet Protocol Service*, WC Docket No. 09-154, *Implementation of Section 224 of the Act, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, at 3 (filed Oct. 9, 2009) ("2009 MDTC Comments").

²³ *Id.* at 2.

²⁴ *See Order and FNPRM*, at ¶¶ 115, 122. *See also*, National Broadband Plan, at 110-111.

²⁵ The MDTC notes that different rates may be justified in limited circumstances, based upon credible cost data provided by the pole owners.

²⁶ 2009 MDTC Comments at 3.

²⁷ *Id.*

²⁸ National Broadband Plan, at 129. *See supra* notes 9-10.

MDTC, therefore, suggests that the FCC take interim steps in the interim to encourage timely attachment. For instance, in furtherance of these goals, the MDTC has coordinated with the Massachusetts Broadband Institute (“MBI”)²⁹ to ensure timely attachment for its Mass Broadband 123 project to bring broadband access to underserved and un-served communities in western Massachusetts. Additionally, the cooperation of pole owners is critical to the success of these projects, which are subject to strict timelines.³⁰ Recognizing this fact, the MBI has secured letters of support from pole owners to work directly with the MBI to ensure timely pole access for the MassBroadband 123 project.³¹ Similar coordination commitments from all other pole owners to ensure timely attachment would significantly further the goal of universal broadband service.

The MDTC thanks the FCC for this opportunity to comment.

Sincerely,

/s/ Geoffrey G. Why

Geoffrey G. Why, Commissioner
Massachusetts Dept. of
Telecommunications and Cable

²⁹ The Massachusetts Broadband Institute is a quasi-public agency tasked by Governor Deval Patrick to meet the broadband access needs of unserved citizens throughout the Commonwealth and manages a statewide Massachusetts Broadband Incentive Fund with up to \$40 million to incentivize public/private partnerships which result in new broadband deployment solutions. *See An Act Establishing and Funding the Massachusetts Broadband Institute*, Chapter 231 of the Acts of 2008, *codified at* G. L. c. 40J, §§ 6B-C. The MBI’s mission is to extend affordable high-speed Internet access to all homes, businesses, schools, libraries, medical facilities, government offices and other public places across the Commonwealth. *See* Massachusetts Broadband Institute Mission Statement, *available at* www.massbroadband.org (last viewed Aug. 13, 2010). Recently, NTIA awarded \$45.4 million in Federal Stimulus Funds to MBI to expand broadband access in Massachusetts. *See Bridging the Digital Divide: Governor Patrick, Congressional Delegation Announce Massachusetts Will Receive \$45.4 Million in Federal Stimulus Funds to Expand Broadband Access in Western and North Central Massachusetts*, *available at*: http://massbroadband.org/2010_eblasts/email070210.html (last viewed Aug. 13, 2010).

³⁰ *See* National Broadband Plan, at 129-30.

³¹ *See, e.g.*, Letter from Jack Conroy, Vice President, Regulatory, Massachusetts, Verizon Commc’ns, Inc. to Lawrence E. Strickling, Assistant Sec’y for Commc’ns and Info., U. S. Dep’t of Commerce, Nat’l Telecomms. and Info. Admin. (Mar. 19, 2010) (letter submitted by Verizon in support of MBI’s BTOP application for the MassBroadband 123 Project) (provided as Appendix A to these comments).